

## **Fair Political Practices Commission**

### **Memorandum**

**To:** Chairman Schnur, Commissioners Garrett, Hodson, Montgomery, and Rotunda

**From:** John W. Wallace, Assistant General Counsel  
Scott Hallabrin, General Counsel  
Roman Porter, Executive Director

**Subject:** Adoption of Amendments to Regulation 18313.5

**Date:** January 18, 2011

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#### **Proposed Commission Action and Staff Recommendation**

Adopt amendments to Regulation 18313.5 concerning online posting of information relating to Commission investigations.

#### **Background and Reasons for Proposed Adoption of New Regulation**

In an effort to provide the public with greater transparency of the Commission's enforcement activity, in February 2007, the Commission's communications staff began responding to inquiries regarding enforcement complaints filed with the Commission.<sup>1</sup> Staff confirmed the receipt of sworn complaints and acknowledged whether an investigation was opened in response to this complaint. Prior to this time, the Commission would neither confirm nor deny the receipt of a complaint or the initiation of an investigation, unless there was some evidence the complainant had already made the complaint public.

In connection with this change, the Commission also began to strictly comply with Section 83115 of the Act. This statute requires the Commission to notify complainants in writing if the Commission takes or plans to take action on the complaint, together with the reasons for such action or nonaction. Moreover, in May 2008, the Commission added a new parallel requirement to Regulation 18360 (with the support of the regulated community),<sup>2</sup> which requires the Executive Director to provide the subject of a sworn complaint with copies of these same documents. The decisions undertaken at the time were initiated with the intent to ensure fair access to this public information by all parties (media, public, individual named in a complaint).

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<sup>1</sup> See September 17, 2010 letter from FPPC Executive Director Roman Porter. (Attachment 1.)

<sup>2</sup> See May 16, 2008 letter from Deborah Kaplan on behalf of the California Political Attorneys Association and April 21, 2008 comment letter from Lance Olson. (Attachment 2.)

### **Public Records Act**

All of the documents discussed above are public records and made readily available through Public Record Act requests from the media, public officials, law firms, and any other person who requested them. Under the Public Records Act, all documents are deemed public unless an express exception exists.

Generally, all transparency laws and policies are based on the same purposes. For example, Section 54950 of the Government Code provides:

“The people of this State do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created.”

The California Public Records Act (CPRA) contains a similar express declaration of the CPRA’s purpose: “the Legislature, mindful of the right of individuals to privacy, finds and declares that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state.” (Section 6250.)

The Supreme Court described the Public Records Act in *Roberts v. City of Palmdale* (1993) 5 Cal.4th 363 as follows:

“The Public Records Act, section 6250 et seq., was enacted in 1968 and provides that ‘every person has a right to inspect any public record, except as hereafter provided.’ (§ 6253, subd. (a).) We have explained that the act was adopted ‘for the explicit purpose of “increasing freedom of information” by giving the public “access to information in possession of public agencies.” ’ (*CBS, Inc. v. Block* (1986) 42 Cal.3d 646, 651 [230 Cal.Rptr. 362, 725 P.2d 470].) As the Legislature declared in enacting the measure, ‘the Legislature . . . finds and declares that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state.’ ” (Section 6250.)

Moreover, in *CBS, Inc. v. Block* (1986) 42 Cal.3d 646, the Supreme Court stated:

“Implicit in the democratic process is the notion that government should be accountable for its actions. In order to verify accountability, individuals must have access to government files. Such access permits checks against the arbitrary exercise of official power and secrecy in the political process.”

**Prior Commission Action on Regulation 18313.5**

After review of the Commission's processes, it was later determined in September 2010, that the Commission could improve its efforts at making certain the public and media are provided with information in a more even-handed and less burdensome manner. Staff found that providing the media with verbal acknowledgement of receiving a complaint or initiating an investigation was inherently biased, since an inquiry would only be made if a reporter had been "tipped off" about a complaint or investigation, or if the reporter were "fishing" for a story. Additionally, since these documents are public records, it seemed unduly burdensome to require members of the public, the media, and campaign staff to submit a formal Public Records Act request for documents that could easily and routinely be redacted and posted online, consistent with other Commission documents.

The decision to post all notices of investigations and their complaints normalizes the information that is provided to the media and public, is consistent with the Public Records Act, and provides an opportunity for the media and public to better scrutinize the operations of the Commission's Enforcement Division.

In May 2010, Regulation 18313.5 was enacted to codify many of the Commission's online posting practices. It provides in pertinent part:

"(a) Not later than 10 days after issuance or receipt by the Commission, the Commission shall post the following information on its website:

"(1) Commission opinions issued pursuant to subdivision (a) of Section 83114.

"(2) Staff advice letters issued pursuant to subdivision (b) of Section 83114.

"(3) Warning, advisory, and closure letters issued by the Enforcement Division.

"(4) Behested payments reports filed with the Commission pursuant to subdivision (b)(2)(B)(iii) and (b)(3) of Section 82015."

At the time Regulation 18313.5 was proposed, staff described the purpose of the regulation as follows:

"The Commission's goal was to make it easier for individuals visiting the website to gain access to important public information regarding Commission activities concerning the enforcement and interpretation of the Political Reform Act as well as other informational reports the Commission deems related to its purposes."

As noted above, in September of 2010 the Commission staff began posting these materials on its website. This decision was based, in part, on the following: (1) the Act and regulations require the release of enforcement investigation notice letters and the associated sworn complaints to the complainant and the person subject to the complaint, and (2) that once these documents were released to the complainant and the person subject to the complaint, there was no justification under the Public Records Act to withhold these documents and the requirement to request these documents is burdensome, in light of current technology.

### **How Notification Letters are Posted**

With respect to investigations based on sworn complaints, the Enforcement Division posts the investigation confirmation letters and initial complaint form. In regard to investigations initiated by the Enforcement Division, the Enforcement Division posts the notice letters and letters on which the investigation is based, if any.<sup>3</sup> With the posting, the website cautions:

“Within 14 days of receiving a complaint signed under penalty of perjury, the Fair Political Practices Commission must inform the complainant of whether or not we will investigate their allegations. The FPPC has begun posting enforcement cases that staff determined, as of September 9, 2010, warrant further investigation. **At this time the Commission has not made any determination about the validity of the allegations made, or about the culpability, if any, of the persons identified below.** (Bold in original).

“Commission staff does not provide status updates on investigations. Investigations are resolved with a determination of no wrongdoing, through advisory or warning letters, issuance of administrative fines, and in some instances civil lawsuits. Once a case is closed, a link to the document discussing the method of closure will be provided.”<sup>4</sup>

### **Public Meetings**

On October 20, 2010, Commission staff held an interested persons meeting to discuss this posting decision. Several issues were discussed, including the manner in which the information was posted on the website, as well as posting other enforcement information on the website. Staff received supportive comments from members of the public and Common Cause, but negative feedback from the California Political Attorneys Association (the “CPAA”). The CPAA advocated rolling the web posting and press policies back to those that existed prior to the decisions of February 2007. They advocated that the Commission cease confirming or denying that investigations were

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<sup>3</sup> The Commission redacts addresses, telephone numbers, e-mail addresses, signatures, and personal financial information before posting to the website.

<sup>4</sup> A copy of the Investigations web page is attached as Attachment 3.

initiated and to cease confirming or denying even the fact that a complaint had been received. They further advocated that no information or documents related to an enforcement action should be released or acknowledged by the Commission, prior to the final disposition of the matter. The CPAA letters raise a variety of concerns that appear to be only satisfied with a total information embargo until the matter is settled or resolved by this Commission after administrative adjudication, which staff does not support.

In light of the comments made at the Interested Persons Meeting, staff had an additional meeting with CPAA representatives where they raised the possibility of posting responses to complaints filed by persons subject to investigation. Staff considered this request and cannot recommend implementation due to the following concerns:

1. **Timing Issues:** Once a decision has been reached to investigate a complaint, any information obtained by the Enforcement Division would be part of an ongoing investigation and the Commission will not release these documents. Thus, any posting-of-responses rule could only apply to the period before the Enforcement Division determines whether or not to investigate a complaint (generally within 14 days).
2. **Process Issues:** It would not be feasible or proper for the agency to review for content the responses received prior to investigation. Subjectively picking and choosing which responses or parts of responses should be posted raises a specter of favoritism or bias in the editing/selection process. Thus, staff's position is that the posting of the responses would need to be an "all or none" process.
3. **Content Issues:** There is a significant concern that the unedited responses will contain cross accusations, the identification of potential witnesses, or other inappropriate content that could harm the investigation or otherwise try the matter in public on the Commission's website. Thus, even within the narrow time constraints of the first consideration, in light of the second consideration, posting of responses could lead to more harm than good.
4. **Balance Issues:** If the Commission began posting responses to complaints, undoubtedly, complainants would want to submit their counter responses, resulting in our website becoming a Commission facilitated medium for campaign messages.

On January 7, 2011, we received a comment letter from Vigo G. Nielsen, Jr. of Nielsen, Merksamer, Parrinello, Gross, & Leoni, LLP regarding the memorandum posted for the December Commission meeting. In essence, Mr. Nielsen suggested that the burden of the added task of posting and redacting responses to complaints would be insignificant. Mr. Nielsen's assertion seems to be based on the erroneous assumption that the Enforcement Division already performs substantive redaction of complaints. In fact, the Enforcement Division does not perform any substantive redaction of complaints.

Rather, the Enforcement Division only redacts specific types of information -- such as signatures, addresses, and telephone numbers.

As noted above, review, redaction, and posting of response letters creates an entirely new level of complexity to the posting of information on the website. Mr. Nielsen acknowledged that the regulation should not create a campaign forum or debate page -- but Mr. Nielsen fails to recognize that this policing of the content of responses required to avoid campaign messages puts the enforcement division in the inevitable position of having to censor documents that could create an appearance of favoritism.

Finally, Mr. Nielsen also stated that the Commission should simply adjust calendars and/or current regulations in order to assume these new duties. Obviously, staff would oppose delaying the investigation of complaints or in any way making the enforcement investigation process dependent on the review, redaction, or posting of responses to complaints on our website.

Based on all of these considerations, it is not advisable to post responses on the website. We do note the current process of confirming the receipt of complaints and the initiation of investigations has been in place for more than three years without any apparent harm to individuals subject to investigation or to the political process. The posting of enforcement documents policy has been in place for more than three months (during a statewide election), and there is no evidence to suggest that the practice of posting otherwise public documents on our website has had any detrimental affect on any election in the state.<sup>5</sup> In fact, Enforcement Chief Gary Winuk, who is in charge of the division that receives and investigates complaints regarding violations of the Act, stated that he has seen no evidence that there has been an increase in frivolous or unwarranted complaints since the Commission began posting this information in September 2010.

### **Other Issues**

In an effort to respond to concerns raised by CPAA members, Commission staff has already made changes to the process and the appearance of the posting page. For example, we included language in the regulation requiring the removal of the posting after a specified period of time, so this information is not on the Commission's website in perpetuity. In addition, CPAA raised a concern about posting the complaints in alphabetical order since the first name on the list, alphabetically, could stay at the top of

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<sup>5</sup> In their October 19, 2010 letter submitted in response to the notice of the October 20, 2010 Interested Person Meeting, the CPAA stated that the posting of complaint information has led to increased media coverage of FPPC investigations. (Attachment 4.) However, no supporting data was included. The letter also referenced a news article in the Santa Rosa Press Democrat to support the argument that posting complaints was "causing" articles to be printed. However, upon review of the article, we noted that (1) the complainant provided information that was used by the reporter (and may have initiated the article), and (2) while the article did note the fact that the Commission was conducting an investigation, the article noted that "no determination about the validity of the complaint" had yet been made. Finally, the title of the article did not refer to an FPPC investigation.

the list for a longer period of time. In order to address this, we reordered the list of names by case number, rather than alphabetically, with the most recent cases appearing on top. This means that the name at the top of the list will constantly change as new cases are posted. We also amplified the disclaimer language on the posting page to highlight text that the CPAA felt was the most important.

Others provided comments about making it easier to identify individuals subject to investigation and in addition to the reordering of cases, we added a search function so members of the media and public are able to locate specific individuals, without having to know the corresponding case number, or scroll through each listing.

### **Proposed Amendments to Regulation 18313.5**

The proposed amendment to Regulation 18313.5 would add “Notices of Investigations” to the list of items to be posted on the website. The amendment includes:

- Posting timelines for investigations based on sworn complaints and staff initiated investigations.
- The type of information that will be redacted to preserve privacy rights and where necessary to protect the investigation.
- And finally, the amendment establishes timelines for removal of the information upon completion of the case.

### ***Attachments:***

1. September 16, 2010 letter from FPPC Executive Director Roman Porter.
- 2a. May 16, 2008 letter from Deborah Kaplan on behalf of the CPAA
- 2b. April 21, 2008 comment letter from Lance Olson.
3. A copy of the Investigations webpage
4. October 19, 2010 CPAA letter submitted in response to the notice of the October 20, 2010 Interested Person Meeting.
5. January 7, 2011, comment letter from Vigo G. Nielsen, Jr.